(25) (26) (26)

Nos. 02-1238, 02-1386, 02-1405

Supreme Court, U.S.
FILED
NOV 28 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioner,

AND

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

AND

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER SOUTHWESTERN BELL TELEPHONE, L.P.

JAMES D. ELLIS
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

PAUL G. LANE
SOUTHWESTERN BELL
TELEPHONE, L.P.
One Bell Center
Room 3520
St. Louis, Missouri 63101
(314) 235-4300

MICHAEL K. KELLOGG
Counsel of Record
GEOFFREY M. KLINEBERG
SEAN A. LEV
DAN MARKEL
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

November 28, 2003

Counsel for Petitioner Southwestern Bell Telephone, L.P.

24 P

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

UNDER THIS COURT'S PRECEDENTS, SECTION 253(a) DOES NOT SPEAK WITH THE CLARITY NECESSARY TO DEPRIVE STATES OF THEIR ABILITY TO CONTROL THEIR OWN SUBDIVISIONS 3

A. The Language of Section 253 Does Not Demonstrate a Clear and Manifest Intent To Preempt States' Prerogatives To Control Their Political Subdivisions 3

B. The Legislative History of Section 253(a) Confirms that Congress Did Not Intend To Strip States of Their Historic Power To Control Their Political Subdivisions 12

C. Respondents' Policy Arguments Provide No Support for Their Position 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alarm Indus. Communications Comm. v. FCC, 131 F.3d 1066 (D.C. Cir. 1997) 6

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 4

Brown v. Gardner, 513 U.S. 115 (1994) 8

City of Abilene v. FCC, 164 F.3d 49 (D.C. Cir. 1999) 9

City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002) 3, 4, 10, 11, 12

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 8

Garcia v. United States, 469 U.S. 70 (1984) 16

Gregory v. Ashcroft, 501 U.S. 452 (1991) ..... *passim*

Jinks v. Richland County, 123 S. Ct. 1667 (2003) 4

Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985) 10, 11

New York v. United States, 505 U.S. 144 (1992) 11

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 11

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 6

Printz v. United States, 521 U.S. 898 (1997) 8

Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533 (2002) 1, 2, 4, 5, 17

Russello v. United States, 464 U.S. 16 (1983) 7

Sailors v. Board of Educ., 387 U.S. 105 (1967) 5

Salinas v. United States, 522 U.S. 52 (1997) 5

Southern Co. Servs., Inc. v. FCC, 313 F.3d 574 (D.C. Cir. 2002) 6

United States v. Bass, 404 U.S. 336 (1971) 1

Waller v. Florida, 397 U.S. 387 (1970) 8

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 1

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 11, 12

ADMINISTRATIVE DECISIONS

Declaratory Ruling, *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168 (2000) 9

Memorandum Opinion and Order, *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460 (1997) 14

CONSTITUTION AND STATUTES

U.S. Const.:

Art. I, § 8, Cl. 1 (Spending Clause) 11

Amend. V (Double Jeopardy Clause) 8

Amend. X 8, 11, 12

Amend. XI 4, 7

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 252(e)(5) 12

47 U.S.C. § 253 ..... 3, 5, 8, 12, 16

47 U.S.C. § 253(a) ..... *passim*

47 U.S.C. § 253(b) 2, 9

47 U.S.C. § 253(d) 16

47 U.S.C. § 275(a)(2) 6

47 U.S.C. § 397(7) 6

Pole Attachments Act, 47 U.S.C. § 224 16

47 U.S.C. § 224(a)(1) 16

Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* 16

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 1

10 U.S.C. § 2871(5) 7

16 U.S.C. § 4502a(c)(1) 7

42 U.S.C. § 12131(1)(B) 6

42 U.S.C. § 12132 6

LEGISLATIVE MATERIALS

141 Cong. Rec.:

p. H4522 14

p. S7890 13

p. S7967 13

p. S8413 13

S. Conf. Rep. No. 104-230 (1996) 1, 13, 15

S. Rep. No. 103-367 (1994) 16

The Communications Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong., 2d Sess. (1994) 16, 17

OTHER MATERIALS

American Public Power Ass'n, *2003 Annual Directory & Statistical Report* 15

REPLY BRIEF FOR PETITIONER SOUTHWESTERN BELL TELEPHONE, L.P.

The rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), serves a fundamental purpose in this Court's jurisprudence. It ensures that Congress will be found to have intruded on core state prerogatives only when it is plain that the Legislative Branch focused on a sensitive issue of federalism and nevertheless decided to alter the balance of federal-state power. As the Court has explained, the *Gregory* plain-statement rule ensures that the Court will not conclude that Congress has negated a "historic power of the States" unless the statute demonstrates that "'"the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 544 (2002) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting in turn *United States v. Bass*, 404 U.S. 336, 349 (1971))).

Respondents' brief does not demonstrate that this established standard is met here. Respondents cite no statutory language (or even legislative history) showing that Congress "faced" and "intended to bring into issue" the specific question posed here: whether States should be prevented from exercising their ordinarily absolute discretion over the powers they grant to their political subdivisions by requiring them to allow those subdivisions to offer telecommunications services.

No such evidence exists. That is because, in enacting the Telecommunications Act of 1996 (the "1996 Act"), Congress was not focused on the unique and difficult issues raised by political subdivisions offering telecommunications services, but rather was interested in replacing laws that prohibited competition of any kind in such markets with a regime that would "accelerate . . . *private sector* deployment of advanced telecommunications." S. Conf. Rep. No. 104-230, at 113 (1996) (emphasis added). The innovation of the 1996 Act lay in its requiring, as a matter of federal law, that States permit

private competition in local telecommunications; it was not in preventing the States from determining whether their own political subdivisions may offer such services.

Because respondents cannot point to any specific statutory language showing that Congress faced and intended to resolve the federalism issue presented here, they rely on the same sort of "general language" that this Court has previously concluded does not demonstrate the requisite plain statement of an intent to override a State's interest in its own self-government. *Raygor*, 534 U.S. at 544-45. But, even wrenched from context, the phrase on which respondents rely – "any entity" – is substantially more ambiguous in its application to States and their subdivisions than others (such as "any recipient of Federal assistance") that the Court has found *not* to be sufficient to satisfy its plain-statement requirements.

When the phrase "any entity" is read *in context*, as it must be, it is evident that 47 U.S.C. § 253(a) is, at a minimum, ambiguous on this point. Indeed, respondents have no cogent response to our showing that their reading of section 253(a) would lead to what they concede are absurd results. They do not contest that, under their reading, a State would be able to abolish a subdivision altogether, but could not prevent that subdivision from offering telecommunications services. Likewise, they do not contest that under section 253(a) a mayor could ignore a town ordinance that prevented the town from offering telecommunications services. They argue, however, that section 253(b) prevents that absurd result. It does not. Section 253(b) does not apply to state or local actions that are not "competitively neutral," and a law that barred one supposed "entity" (the town) from offering telecommunications would not pass that test.

In the end, although respondents do not overtly argue that *Gregory* does not apply here, their real argument is that the Court should depart from that precedent and its plain-statement rule. Indeed, they go so far as to argue that *Gregory* "does not require that an ambiguity automatically be resolved against Congress's effort to empower local govern-

ments" even where, as here, that "empowerment" comes at the expense of a State's sovereignty interest in controlling its subdivisions. Resp. Br. 38. That, however, is exactly what *Gregory* does require. Under that decision, anything less than a "clear and manifest" demonstration in the statutory text of a legislative intent to divest States of their core sovereign powers is insufficient to alter the federal-state balance. 501 U.S. at 460-61 (internal quotation marks omitted). And there is no basis to argue, as respondents do implicitly, that the unanimous judicial determinations that *Gregory* applies in this context are incorrect. Control over political subdivisions is, in this Court's words, "central to state self-government," *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002), and, like *Gregory* itself, involves the State's "establishment and operation of its own government," *Gregory*, 501 U.S. at 462 (internal quotation marks omitted). Accordingly, the *Gregory* rule squarely applies, and it defeats respondents' claims.

ARGUMENT

UNDER THIS COURT'S PRECEDENTS, SECTION 253(a) DOES NOT SPEAK WITH THE CLARITY NECESSARY TO DEPRIVE STATES OF THEIR ABILITY TO CONTROL THEIR OWN SUBDIVISIONS

A. The Language of Section 253 Does Not Demonstrate a Clear and Manifest Intent To Preempt States' Prerogatives To Control Their Political Subdivisions

1. Respondents claim that the phrase "any entity" is, in isolation, sufficiently "inclusive" that it may be "naturally" read to cover political subdivisions. They therefore argue that the Court should find that Congress stripped States of their deeply rooted authority to control the actions of their political subdivisions. *See* Resp. Br. 8-14. Respondents stake their case primarily on the allegedly inclusive nature of this phrase read in isolation. *See, e.g., id.* at 13-14 (relying on use of this "expansive" phrase to assert that the "meaning of Section 253(a) could hardly be clearer").

Even on its own terms, that analysis runs headlong into this Court's precedents. The phrase "any recipient of Federal assistance" is certainly, in isolation, inclusive enough that it *could* be read to encompass the States, especially in a context where it is undisputed that a state defendant is a recipient of federal aid. Under respondents' theory, the use of such a general phrase should constitute a plain statement sufficient to limit the States' historic prerogatives. The Court, however, concluded differently. It found that such a "general authorization for suit" was *not* enough to diminish the rights of the States. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

Likewise, the phrase "any claim" is, by itself, potentially inclusive enough to include claims brought against States. But in *Raygor*, too, however, the Court determined that the statutory language did not show a "specific or unequivocal" intent to apply to claims brought against the States. 534 U.S. at 545. Under respondents' theory, the Court should have reached a contrary conclusion.

Respondents wrongly claim that the Court's decision in *Jinks v. Richland County*, 123 S. Ct. 1667 (2003), somehow diminishes the relevance of *Raygor* to this case. In fact, *Jinks reinforces* the importance of the plain-statement rule that applies here. In *Jinks*, the Court concluded that, because, under prior decisions that were not challenged there, the Eleventh Amendment does not protect municipalities (unlike States), there was no "state sovereignty" concern that would require an "unmistakably clear" statement of congressional intent. *Id.* at 1673 (internal quotation marks omitted). In this context, by contrast, the Court has found that plain-statement rules *do* apply to matters involving the "structure of [state] government," *Gregory*, 501 U.S. at 460, and has stressed that state control over political subdivisions is "central to state self-government," *City of Columbus*, 536 U.S. at 437. For those reasons, *Gregory* applies in this context, as even the Eighth Circuit acknowledged. *See* SWBT Pet. App. 5a-6a. Because *Gregory*'s plain-statement rule applies, *Raygor*, not *Jinks*, is the appropriate analogy. The fact that *Raygor* and

Jinks came out differently simply shows that the plain-statement rule applicable here has real significance in this Court's interpretation of statutes.

Salinas v. United States, 522 U.S. 52 (1997), a case respondents (and the Eighth Circuit) have stressed, is likewise inconsistent with respondents' argument that the "any entity" phrase by itself establishes that Congress intended to override States' "absolute discretion" as to the "number, nature and duration of the powers conferred" on their subdivisions. *Sailors v. Board of Educ.*, 387 U.S. 105, 108 (1967) (internal quotation marks omitted). In *Salinas*, the Court did *not* conclude without further inquiry that the phrase "any business, transaction, or series of transactions" by itself was sufficient to apply federal bribery law to state officials. Instead, the Court also discussed what it concluded was "broad" surrounding statutory language – including the statutory definition of the "circumstances" in which the bribery statute would apply, which Congress made plain included all instances where a "*government*" received federal benefits. 522 U.S. at 57 (emphasis added). The Court also detailed the important evidence of legislative intent contained in the history of amendments to the relevant statutory provisions. *See id.* at 58-59. The Court thus rested its decision in *Salinas* not just on a general phrase in isolation, as respondents mistakenly argue (at 41), but on the "chronology and the statutory language" *as a whole*. 522 U.S. at 58.

As we explained at the outset, there is a fundamental reason that the Court has repeatedly concluded that this kind of "general language" that respondents rely upon should not be dispositive. Such language does not demonstrate that Congress "has in fact faced" and "intended to bring into issue" the "critical matters involved in the judicial decision." *Raygor*, 535 U.S. at 544 (internal quotation marks omitted). Accordingly, it is significant that respondents have cited *nothing* in the text of section 253 that demonstrates that Congress faced the specific question of preempting state determinations as to regulation of political subdivisions, nor could they do so.

In this regard, our claim is not, as respondents assert, that the only way to satisfy *Gregory* is to "explicitly mention municipalities" in the statute. Resp. Br. 39. On the contrary, there are many different ways that Congress could have indicated that it intended to take the extraordinary step of denying States the right to control the actions of their political subdivisions. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), a case that respondents highlight (at 40, 41-42), is instructive on this point. There, Congress not only referred specifically to "public entit[ies]," but also expressly defined that term to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. §§ 12131(1)(B), 12132. Given that specific definition, this Court had no difficulty finding that the *Gregory* rule was satisfied as to state prisons. Congress could have included similar or equivalent language here, which would have satisfied *Gregory* even though it did not refer to municipalities. The difference between the specific congressional intent shown by the language in *Yeskey* and the general language on which respondents are forced to rely is telling.

2. Even in isolation, the language that respondents highlight is more ambiguous than the textual evidence that the Court found insufficient to satisfy the *Gregory* standard in prior cases.

Although we have never disputed that the term "entity" *could* be read to encompass political subdivisions, there is ample reason to believe that it does not *necessarily* do so. In fact, the precise contours of that term have long been understood to be ambiguous. Courts have repeatedly found that, absent a statutory definition, that term is ambiguous. *See, e.g., Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (the term "entities" "bears different meanings depending upon the context"); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding the word "entity" to be ambiguous in 47 U.S.C. § 275(a)(2)). And, to avoid such ambiguities, Congress has defined that term over and over in the United States

Code, and has done so in ways that both include and exclude political subdivisions – for instance, elsewhere in the Communications Act itself, Congress defined the term "noncommercial telecommunications entity" to include, among other things, bodies owned by a "State" or a "political . . . subdivision of a State." 47 U.S.C. § 397(7).

Respondents simply ignore this last piece of evidence, even though this Court has concluded that the use of such specific language elsewhere in a statute provides an important indication of Congress's intent. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted; alteration in original).

Respondents' answer to the fact that, in other contexts, Congress has defined "entity" both to include and to exclude political subdivisions is to suggest that Congress uses these definitions merely to "limit[]" that term. Resp. Br. 14. That claim is incorrect. In fact, Congress often defines the term "entity" where it desires to clarify that it intends that the term be read *broadly*, as in 10 U.S.C. § 2871(5), where "eligible entity" is defined to include "any private person, corporation, firm, partnership, company, [and] State or local government," and in 16 U.S.C. § 4502a(c)(1), where the same term is defined to include both "political subdivision[s] of a State" and "private organization[s]." Thus, Congress has defined this term not to narrow an otherwise-clear meaning, as respondents would have it, but to demonstrate clearly that, unlike in this case, it wanted "to cover the waterfront and omit no possibilities." Resp. Br. 11. That fact demonstrates that Congress understands that the term is inherently vague as to its scope and that definition is needed to apply it both broadly and narrowly.

Nor is it relevant to whether Congress understood political subdivisions to be "entities" separate from the States that, for some purposes, such as the Eleventh Amendment, this Court

has treated the States and their political subdivisions separately. *See id.* at 10. It is equally the case that, for other purposes, such as the Tenth Amendment, the Court has concluded that political subdivisions should be treated no differently than the State itself. *See Printz v. United States*, 521 U.S. 898 (1997); *see also Waller v. Florida*, 397 U.S. 387 (1970) (finding that States and localities should be treated the same for purposes of the Double Jeopardy Clause). Accordingly, even if Congress were assumed to look at this Court's jurisprudence on such issues to determine whether a locality would be understood to be a separate "entity" from the State – which would appear to be a tenuous line of reasoning – that would only confirm the existence of substantial ambiguity here.

3. If respondents had stronger evidence that the term "entity" in isolation unequivocally covers political subdivisions, their argument would still lack merit. That is because the statutory context of section 253 demonstrates that Congress did not unequivocally intend to deprive States of their authority over political subdivisions. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). As an initial matter, as the FCC concluded (*see* SWBT Pet. App. 19a), given the phrasing of section 253(a), it is in fact most natural to read section 253(a) to apply to "entities" that are ordinarily subject to "State" and "local" telecommunications regulation, and not to the States and their subdivisions themselves, which are normally the bodies that would *create* such regulations. *Cf.* Resp. Br. 9.

Beyond that, respondents have no plausible response to our showing that, if the term "entity" is read to encompass the States and their political subdivisions, it would lead to absurd results that Congress could not have intended. *See* SWBT Br. 19. Respondents do not deny that, under their reading of section 253(a), that provision by itself would allow a town's mayor to ignore a town ordinance prohibiting the provision of a telecommunications service because that ordinance

would be a "local statute or regulation" that has the effect of prohibiting the political subdivision from providing a telecommunications service. Instead, respondents argue (at 22-23) that section 253(b) somehow avoids such obviously absurd results.

That is simply wrong. If localities are "entities" under section 253(a), then section 253(b) would not permit any local ordinance barring such "entities" – and only such "entities" – from offering telecommunications. Section 253(b) preserves state and local rules only if they are "*competitively neutral*." A local law barring only one kind of "entity" from offering telecommunications could not conceivably be competitively neutral. *See, e.g.*, Declaratory Ruling, *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, 15175-78, ¶¶ 19-24 (2000) ("competitively neutral" rules cannot "unfairly advantage nor disadvantage one provider over another") (internal quotation marks omitted). Accordingly, a result that respondents concede is "absurd by anyone's lights" (Resp. Br. 22) is avoided only if section 253(a) itself is read *not* to affect statutes and ordinances barring local government participation in telecommunications markets.

Read in that more reasonable way, moreover, section 253(a) coheres with section 253(b)'s plain intent to preserve important policies of particular concern to the States. *See City of Abilene v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999) (stressing that section 253(b) "set[s] aside a large regulatory territory for State authority"); SWBT Br. 20-21 (explaining that section 253(a) should be interpreted in a manner consistent with Congress's evident respect for traditional state prerogatives in section 253(b)). Respondents' position, by contrast, results in section 253(b) being highly respectful of traditional state policies, but section 253(a) intruding on one of a State's most fundamental sovereign rights – the ability to control its subdivisions. It would have been odd indeed for Congress to intend such a jarring disjuncture.

Respondents likewise do not have any plausible explanation as to why section 253(a) should be read to create a bizarre scheme under which federal law permits States to abolish localities altogether, but prevents them from taking the much more limited step of stopping localities from offering telecommunications services. *See* SWBT Br. 19. Respondents appear to respond by claiming that it would not be "extraordinary" for Congress to limit state authority in this manner. Resp. Br. 24-25. That argument cannot be squared with established principles. As we have stressed, this Court has made plain not only that States have "absolute discretion" to determine what powers political subdivisions will exercise, but also that "[w]hether and how to use that discretion is a question central to state self-government." *City of Columbus*, 536 U.S. at 437 (internal quotation marks omitted); *see also* SWBT Br. 13-14 (collecting multiple authorities). Contrary to respondents' assertions, it is plainly an "extraordinary" decision for Congress to interfere with such a central element of state self-government.

Indeed, respondents themselves claim to have found only *one* other instance where Congress has allegedly interfered similarly in the States' absolute control over their subdivisions. *See* Resp. Br. 25 (citing *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985)). By itself, that fact is telling. If it were in fact not an "extraordinary" thing for Congress to tell States whether they can exercise control over their political subdivisions, one would expect to find more than a single alleged example of such actions in more than two centuries of congressional enactments.

Moreover, even respondents' lone example turns out not to be analogous to this case. *Lawrence County* involved a dispute over the interpretation of language in a statute authorizing the spending of *federal* money. *See* 469 U.S. at 257-58; Resp. Br. 30 n.12 (conceding in a footnote that *Lawrence County* "involved a federal grant program, enacted under the Spending Clause"). It is a far different thing for Congress to place conditions on the spending of federal money than to

limit the inherent powers that the States possess separate and apart from any federal authorization. *See, e.g., New York v. United States*, 505 U.S. 144, 157 (1992) (discussing how Tenth Amendment limitations on federal power generally are not implicated by congressional action under the Spending Clause).[1]

4. Because this Court's cases establish that it is in fact an extraordinary action for Congress to infringe on States' sovereignty interest to exercise absolute discretion over the powers granted to their subdivisions, there is no merit to respondents' claim that *Gregory*'s rule is somehow weaker or inapplicable here. *See* Resp. Br. 25-33.

Respondents rely primarily on *City of Columbus* and *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), in suggesting that the Court should employ the "usual methods of statutory interpretation" and not any plain-statement rule in this case. Resp. Br. 25. Respondents' reliance on these cases is misplaced.

In fact, *City of Columbus* specifically emphasizes States' sovereignty interest in determining the powers of their subdivisions. *See* 536 U.S. at 437. Even more to the point, the Court stressed there that, "*[a]bsent a clear statement to the contrary*, Congress' reference to the 'regulatory authority of the State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." *Id.* at 428-29 (emphasis added). Respondents notably ignore that language. Similarly, in *Mortier*, the Court emphasized States' authority to control their

---

[1] Moreover, contrary to respondents' footnote argument (*see* Resp. Br. 30 n.12), *Lawrence County* did not involve a condition on federal funds that would trigger the plain-statement rule of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). In *Pennhurst*, the Court faced an argument that States that accepted federal funds would be subject to private rights of action, and it required a clear statement of intent to support that. *See id.* at 15-17. In *Lawrence County*, the statute did not place a condition on the use of federal funds; the question was whether the State could pass a law imposing such conditions, and thus intercede in the federal program. *See* 469 U.S. at 258-59.

subdivisions and read the relevant statute to be consistent with that long-established rule. *See* 501 U.S. at 607-08. And the Court's holding there – which read the federal statute to respect such state prerogatives – certainly does not support respondents' position.

Additionally, neither *Mortier* nor *City of Columbus* involved a federal statute that allegedly preempted a state law allocating responsibilities among political subdivisions (or refusing to do so). If, for instance, Wisconsin passed a statute requiring that all pesticide regulation should be done by the State itself – which is the proper analogy to this case – there is nothing in *Mortier* or *City of Columbus* that indicates that the Court would have found federal law to have preempted that choice, or that the Court would have refused to apply the *Gregory* plain-statement rule to determine whether Congress intended to override that state legislative judgment as to the operations of its own government.[2]

B. The Legislative History of Section 253(a) Confirms that Congress Did Not Intend To Strip States of Their Historic Power To Control Their Political Subdivisions

Respondents also contend that the legislative history of section 253 demonstrates that Congress intended that provi-

---

[2] Respondents take issue with our contention that, read as respondents urge, section 253(a) also raises significant constitutional concerns that the Court should avoid absent a plain statement. *See* SWBT Br. 15 n.10. In particular, respondents claim that their interpretation of section 253(a) does not implicate the Tenth Amendment by conscripting the States to implement the federal regime because it merely "requires the States only to *refrain* from enacting anti-competitive barriers to entry." Resp. Br. 33. That assertion is incorrect. In fact, section 253(a) requires the States, through their subdivisions – the "'convenient agencies'" over which the State, as a matter of federal law, has absolute control, *City of Columbus*, 536 U.S. at 437 (quoting *Mortier*, 501 U.S. at 607-08) – to participate affirmatively in the federal scheme for injecting competition into local markets, regardless of whether the States agree with that policy. *Cf.* 47 U.S.C. § 252(e)(5) (authorizing States to opt out of implementation of the 1996 Act without penalty).

sion to deprive States of their authority to control the activities of their political subdivisions. That claim is inaccurate.

As an initial matter, even if the legislative history supported respondents' theory, that would not aid their cause. As this Court explained in *Gregory* itself, and as we discussed in our opening brief (at 20 n.12), the plain statement required here must be in the *text* of the statute – it must be "plain to anyone reading the Act" that it impinges on the relevant state prerogative. 501 U.S. at 467. Accordingly, even if the legislative history tilted in respondents' direction, it would be irrelevant.

In fact, however, the legislative history weighs strongly against respondents' arguments. The most significant legislative history on this issue comes in the very first sentence of the authoritative Joint Explanatory Statement of the Committee of Conference, which reflects the views of the legislators who negotiated the text of the ultimate bill that became the 1996 Act. In that first sentence, the Conference Committee made clear their understanding that the 1996 Act was designed "to accelerate . . . *private sector* deployment of advanced telecommunications." S. Conf. Rep. No. 104-230, at 113. Respondents are notably silent about that language, which we highlighted in our opening brief (at 17) and which is surely the most relevant legislative history as to Congress's intent.[3]

---

[3] Statements by Senator Pressler, a lead Senate Manager of the bill, and other legislators reiterate this point. *See, e.g.*, 141 Cong. Rec. S7890 (June 7, 1995) (Sen. Pressler) ("The bill is designed to rapidly accelerate private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."); *id.* at S7967 (June 9, 1995) (Sen. Craig) ("First, and foremost, it is important that we do not lose sight of the ultimate goal of reforming the 1934 act, which should be to establish a national policy framework that will accelerate the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."); *id.* at S8413 (June 14, 1995) (Sen. Rockefeller) ("The idea is the Federal Government no longer needs to micromanage who can provide what kind of service to America's households and to America's

Moreover, the reason that Congress focused on private sector competition was that the 1996 Act's major innovation was to allow private companies to enter into local telecommunications. Congress had little reason to preempt state experimentation as to the different and thorny issues raised by municipal entry into local telecommunications markets because, as respondents do not dispute, hardly any municipalities offered telecommunications in 1996. *See* SWBT Br. 18.[4]

For this reason, for all their digging, respondents have not found a single instance where the authoritative Conference Report, any other House or Senate report, or even a single Senator or Representative indicated that Congress's intent was to supercede state laws barring political subdivisions from providing telecommunications services. Indeed, respondents have not even found any instance where Congress noted the existence of such state laws, much less have they demonstrated that Congress affirmatively considered the

---

businesses; that, as technology develops to give Americans incredible choices and incredible opportunities from the basics of telephone service to the endless possibilities of computers, the private sector should be able to compete for customers, for business and for profits."); *id.* at H4522 (May 3, 1995) (Rep. Barton) ("If we can create a fair marketplace for telecommunication services, the industry, through competition, will create the much-touted information superhighway in a less expensive and more efficient fashion.").

[4] Contrary to respondents' claim (at 13), this does not mean that Congress should have simply preempted exclusive-franchise laws. Congress understood that a variety of laws that fell short of exclusive franchises could have the "effect" of prohibiting the ability of a private entrant to compete. *See, e.g.*, Memorandum Opinion and Order, *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3497-98, ¶¶ 76-78 (1997) (concluding that section 253(a) preempted Texas's requirement that all telecommunications carriers deploy physical facilities sufficient to serve a minimum geographic area, because such a "build-out requirement" compelled competitive carriers to provide service in a particular manner and precluded their ability to provide service exclusively through resale or by leasing facilities from the incumbent provider).

effect of the proposed federal statute on such laws and nevertheless affirmatively decided to override them.

Because no such evidence exists, respondents are reduced to arguing (at 18-19) that the use of the word "utilities" in the committee report somehow shows that Congress affirmatively intended to override state laws limiting the provision of telecommunications services by *municipalities*. Municipalities and utilities are plainly different things, however, and, if anything, the reference to "utilities" reinforces the idea that Congress anticipated that the "private sector" would enter local telecommunications markets and compete for customers. The overwhelming majority of power in this country is provided by private, not public, utilities. Indeed, only about 13.7% of power is generated by publicly owned providers; just 14.6% of consumers are served by such companies. *See* American Public Power Ass'n, *2003 Annual Directory & Statistical Report* at 13, 14.

Accordingly, just as Congress stressed the fact that "meaningful facilities-based competition is possible" because *private* cable operators such as "Time Warner" and "Jones Intercable" had facilities serving 95% of homes and were poised to compete, S. Conf. Rep. No. 104-230, at 148, Congress's references to "utilities" in no way demonstrates an intent – much less an unmistakably clear intent – to strip States of their historic authority to control the actions of their political subdivisions. In any event, as respondents acknowledge (at 34-36), the FCC has interpreted the statute only to preserve state laws that prevent political subdivisions from offering telecommunications; it has not concluded that any utility that has some form of "public ownership" may be barred from offering telecommunications. *See* SWBT Pet. App. 14a.[5]

---

[5] Although respondents claim that the FCC's decision creates "anomalies," Resp. Br. 34, it is far from unusual for the FCC or other expert agencies to have to make line-drawing judgments as to the scope of an ambiguous congressional enactment. Section 253(a), which speaks of state regulations that have the "effect" of prohibiting the "ability" of "entities" to offer telecommunications services, plainly anticipated that

Contrary to respondents' argument, Congress's amendment of the Pole Attachments Act, 47 U.S.C. § 224, demonstrates nothing about Congress's intent in section 253. The "utilities" subject to section 224 are not companies that offer telecommunications; rather, they are companies (such as power and cable companies) that own poles and other facilities to which telephone lines must be attached. *See* 47 U.S.C. § 224(a)(1) (defining a "utility" for these purposes as anyone that "owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications"). A congressional acknowledgment that public bodies may own poles does nothing to show that Congress anticipated that municipalities would provide telecommunications or, more to the point, that they could do so even where an otherwise-valid state law prohibited such activities.

Finally, respondents cite a statement by a single legislator (Sen. Lott) at a *hearing* held during a different Congress two years before the 1996 Act was passed. *See* Resp. Br. 21. Even if this single statement helped respondents, it would be an extraordinarily thin reed on which to rest any conclusion about congressional intent. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) (noting that the Court has "eschewed reliance on the passing comments of one Member [of Congress]"). In any event, the context of this lone statement does not support respondents' argument. Senator Lott spoke after the statement of the chairman of a *private* utility (Southern Company Services) who talked about the need to amend what was then section 302(b) of the proposed bill, *see* S. Rep. No. 103-367, at 163 (1994), which dealt with the Public Utility Holding Company Act of 1935. *See The Communications*

---

such line-drawing would be necessary, and thus gave the FCC the authority to make case-by-case determinations of preemption. *See* 47 U.S.C. § 253(d). This does not mean, as respondents allege (at 35), that the scope of section 253(a) depends on state law, but only that substantively different state prohibitions may be treated differently under section 253. Indeed, respondents themselves ultimately concede that distinctions between political subdivisions and utilities that have a separate existence can be drawn. *See* Resp. Br. 36.

Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong., 2d Sess. 369-77 (1994). Senator Lott's statement about the need to "make sure we have got the right language to accomplish what we wish accomplished," *id.* at 379, is thus best understood to reflect the issue about the language in section 302(b) of the draft bill, which has nothing to do with the scope of what ultimately became section 253(a). Respondents' argument on this point ignores these facts and is thus misguided.

C. Respondents' Policy Arguments Provide No Support for Their Position

Respondents argue that there are "compelling" reasons that municipal entry would enhance telecommunications competition and that three Commissioners of the FCC expressed the view that States should use mechanisms other than bans to address the issues of cross-subsidization and unfair competition that municipal entry raises. *See* Resp. Br. 15-17. Respondents' *amici* make similar arguments.[6]

The merits of these arguments are subject to substantial debate, and there are significant reasons to think that it is dubious economic policy to permit municipalities and other political subdivisions to compete with the private companies that they regulate. *See, e.g.*, United States Telecom Ass'n *et al. Amicus* Br. 15-24. Moreover, even aside from economics, States may legitimately decide as a political matter that they wish their instrumentalities to steer clear of private markets.

In the end, however, the Court need not enter such debates. As we have emphasized, the whole point of the *Gregory* principle is to ensure that policy decisions affecting "traditionally sensitive areas," *Raygor*, 534 U.S. at 543 (internal quotation marks omitted), including the "structure of [state] government," *Gregory*, 501 U.S. at 460, are made by responsible *legislators*, not by agencies and courts trying to divine legislative intent where it is not unmistakably clear. In most cases, those determinations are to be made by state represen-

---

[6] *See, e.g.*, Knology *Amicus* Br.; High Tech Broadband Coalition *et al. Amicus* Br.; Consumer Fed'n of America *Amicus* Br.

tatives, who, as this Court has stressed, are free to experiment with different solutions, including both the path that Missouri has followed and the alternative paths proposed by respondents and their *amici* and adopted in other States. *See id.* at 458. Alternatively, where Congress has considered the specific issue and spoken directly to it, such matters may be decided by the federal legislature. Because that has not occurred here, it is the Missouri Legislature's prerogative to follow the path that it believes is best suited for the people of that State.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES D. ELLIS
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

PAUL G. LANE
SOUTHWESTERN BELL TELEPHONE, L.P.
One Bell Center
Room 3520
St. Louis, Missouri 63101
(314) 235-4300

MICHAEL K. KELLOGG
Counsel of Record
GEOFFREY M. KLINEBERG
SEAN A. LEV
DAN MARKEL
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

November 28, 2003

Counsel for Petitioner Southwestern Bell Telephone, L.P.